Supreme Court, U. S.
FILED
FEB 1 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1187

CLAYTON M. FOX, PETITIONER

vs.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
THIRD CIRCUIT

SANFORD H. COHEN, ESQ.
1201 Chestnut Street
Suite 300
Philadelphia, PA 19107
(215) 563-3377

ROSEMARIE T. KENKELEN,
ESQUIRE, Of Counsel

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1979

No.

CLAYTON M. FOX, PETITIONER

vs.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
THIRD CIRCUIT

SANFORD H. COHEN, ESQ.
1201 Chestnut Street
Suite 300
Philadelphia, PA 19107
(215) 563-3377

ROSEMARIE T. KENKELEN,
ESQUIRE, Of Counsel

INDEX Page

Opinions Below..... 1
Jurisdiction..... 1
Questions Presented..... 2-4
Statutory and Constitutional provisions involved..... 4-5
Statement of the Case..... 7-11
Reasons for Granting the Writ..... 12

I. THIS CASE INVOLVES AN ISSUE OF SUBSTANTIAL IMPORTANCE..... 12

II. THE CIRCUIT COURTS ARE CLEARLY DIVIDED AS TO THE STANDARD WHICH MUST BE APPLIED IN ASSESSING THE EFFECTIVENESS OF COUNSEL... 17

III. THE RESOLUTION OF THE ISSUES INVOLVED IN THIS CASE WILL HAVE PUBLIC IMPACT.....19-20

Conclusion..... 20

Judgment of Court of Appeals.Appendix A

CASES — Page

Moore v. United States, 432 F.2d 730 (3rd Cir. 1970)..... 13

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed 2d 763, on remand 453 F.2d 745 (1970)..... 13

Rummel v. Estelle, 590 F.2d 103 (5th Cir. 1979)..... 13

Sawecki v. Johnson, 475 F.2d 183 (6th Cir. 1973)..... 16

United States v. deCoster, 487 F.2d 1203 (D.C. Cir. 1973)..... 13

United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976)... 18

Miscellaneous

American Bar Association Code of Professional Responsibility.....14-15

27 Federal Bar Journal 228..... 18

42 Fordham Law Journal..... 18

The Petitioner, Clayton M. Fox, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on December 3, 1979.

OPINIONS BELOW

There was no formal opinion of the District Court. No opinion was rendered by the Court of Appeals, its order affirming the conviction of the Petitioner is set forth in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1979. A timely motion to stay the issuance of the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate

Procedure was filed on December 24, 1979 which was granted by the Court of Appeals for the Third Circuit on or about December 26, 1979.

A motion to further stay the mandate was granted by the Court of Appeals for the Third Circuit on January 2, 1980. On January 2, 1980, Justice William Brennan, Jr. signed an Order extending the time for filing this petition for writ of certiorari to and including February 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether appointed counsel's inadequate preparation of the facts and the law pertinent to Petitioner's case deprived Petitioner of his Sixth

Amendment right to the effective assistance of counsel.

2. Whether the trial court erred in failing to question sufficiently the qualifications of court-appointed counsel, H. Richard Agler, when Petitioner raised the issue of counsel's ineffectiveness at the pre-trial colloquy.

3. Whether the trial court committed an abuse of discretion in denying Petitioner's motion for a continuance at pre-trial conference which deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel.

4. Whether the delay in filing the information by the United States against Petitioner, Clayton M. Fox, for wilful failure to file income tax returns in violation of 26 U.S.C. 7203 deprived

Petitioner of his Fifth Amendment right to due process of law.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Sixteenth Amendment to the United States Constitution provides in pertinent part as follows:

> "Amendment XVI-INCOME TAX
>
> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "AMENDMENT V-CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

> indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

26 U.S.C.A. 7203 provides in pertinent part as follows:

"WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than $10,000.00 or imprisoned

not more than one year or both, together with the costs of prosecution. As amended June 28, 1968, Pub.L. 90-364, Title I, §103(e)(5), 82 Stat. 264."

STATEMENT OF THE CASE

The case originated from the filing of a four count information by the United States Attorney for the Eastern District of Pennsylvania on January 12, 1979, almost five years hence from the first alleged violation, which charged the Petitioner, Clayton M. Fox, with wilful failure to file federal income tax returns for the years 1974-1977 inclusive, an alleged violation of 26 U.S.C. 7203. At the request of the Petitioner, the Honorable William Ditter of the United States District Court for the Eastern District of Pennsylvania granted a change of venue

for convenience to the United States District for the Middle District of Pennsylvania.

On February 15, 1979, the Honorable Malcolm Muir of the United States District Court for the Middle District of Pennsylvania advised the Petitioner to secure counsel of his choice before February 26, 1979 otherwise, the Court would select counsel for him. During this period, the Petitioner attempted in vain to retain private counsel, but was unable to do so as the many attorneys whom Mr. Fox contacted were especially busy at this time. Since the Petitioner was unable to retain private counsel, before the specified date, the Court appointed H. Richard Agler, Esquire, to represent the Petitioner. Appointed counsel, who

was also an accountant, briefly conferred with the Petitioner on two occasions and admitted in a Motion for a Continuance of the trial and for the filing of pre-trial motions that previous commitments such as preparation of income tax returns and a National Guard commitment precluded him from actively advancing his client's interests in conformance with the United States Constitution. The Petitioner in good faith, believed that he had no legal obligation to file income tax returns since he was not earning "income" within the meaning of the Sixteenth Amendment and the Federal Income Tax Statute.

The Honorable Malcolm Muir failed, however, to grant Mr. Agler's request for a continuance on or about March 20, 1979. At no time did Petitioner's court appointed counsel withdraw

from the case when the demands of his prior commitments became pressing. The Petitioner had submitted a pro se motion to the Court to dismiss for lack of jurisdiction because court-appointed counsel had neglected to review the issues which the Petitioner articulated in his Motion to Dismiss and to file an Amended Motion with the Court. Since Petitioner's motion was not filed by counsel, the Honorable Malcolm Muir dismissed it.

The Petitioner contacted the Court on several occasions and advised representatives of the Court, to no avail, that Mr. Agler was not representing him zealously. On the morning of the trial, April 20, 1979, the Petitioner again unsuccessfully raised the issue of ineffectiveness of court-

appointed counsel, Mr. Agler, before the Honorable Malcolm Muir (Trial Transcript PP. 5-6).

The Honorable Malcolm Muir refused to grant a continuance of the trial and appointed Mr. Agler as stand-by counsel for the Petitioner. The Petitioner indicated to the Court that he would not participate in his trial and that he would not represent himself (T.T. P.10-12).

The Petitioner, Clayton M. Fox, was convicted by a jury of four counts of wilful failure to file income tax returns on April 20, 1979.

On June 11, 1979 and June 12, 1979, the Petitioner was sentenced to three consecutive six-month prison terms at Lewisburg Prison, fined $10,000.00 and to two years probation.

The Circuit Court for the Third Circuit Court of Appeals affirmed the judgment of conviction of the United States District for the Middle District on December 3, 1979 (infra P.)

Also, the Court of Appeals has stayed the mandate until it receives notification from this Court that a timely petition for a writ of certiorari has been filed.

REASON FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN ISSUE OF SUBSTANTIAL IMPORTANCE.

This case raises a serious issue as to the quality of representation which will comport with the constitutional mandate that a defendant accused of a crime receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States

Constitution.

This Court in McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d, 763 on remand 453 2d 745 (1970) and the various Circuit Court of Appeals have addressed themselves to the question of the effectiveness of counsel at the pre-trial, trial and appellate stages of the criminal process. One theme seems to predominate in every decision rendered by the Circuit Courts of Appeals where the effectiveness of counsel was at stake - that counsel must actively advance the interests of his client. Moore v. United States, 432 F.2d 730 (3d Cir. 1970), Rummel v. Estelle, 590 F.2d 103 (5th Cir. 1979), United States v. DeCoster, 487 F.2d 1203 (D.C. Cir. 1973)

In United States v. DeCoster(supra), the Court of Appeals for the District

of Columbia Circuit reiterated guidelines originally promulgated by the American Bar Association in assessing the effectiveness of counsel.

The decision in pertinent part states:

> "...Counsel must conduct appropriate investigations; both factual and legal to determine what matters of defense can be developed. This means that in most cases a defense attorney or his agent should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement agencies. And, of course, the duty to investigate also requires adequate legal research."

The Code of Professional Responsibility also states the following:

DR 6-101

"A) A lawyer shall not

> neglect a legal matter entrusted to him."

Depriving a Defendant accused of a crime of the effective assistance of counsel also denies the Defendant of other constitutional protections such as the right to confront and cross-examine the State's witnesses against him and ultimately the right to due process of law. Since the State controls the machinery of the criminal process, the Defendant is at a distinct disadvantage whenever counsel is dilatory in preparing his client's case.

A defense which would be likely uncovered during pre-trial investigation will be lost. Further, a client unskilled in the intracacies of the law is unable to appraise the skill of counsel in preparing his/her case and

thus is at the mercy of whomever the Court shall appoint for him in the event that he or she is unsuccessful in retaining private counsel of his/her choice. The relationship of an attorney to his client is a fiduciary one - a client trusts that his/her attorney will actively prepare his or her case. And the omission is more glaring in the case of court-appointed counsel as it is incumbent upon him to advise the court of other commitments which would bar him or her from zealously representing his or her client. Once the court is apprised of counsel's alleged ineffectiveness, it must probe further the validity of the client's allegation. Sawecki v. Johnson, 475 F.2d 183 (6th Cir. 1973).

The lower court and the Court of Appeals erred in failing to appoint

alternate counsel or to grant a continuance when the Petitioner consistently advised the Court as to his ineffectiveness.

The record clearly demonstrates that counsel was ineffective as counsel admitted in his motion for a continuance that time restraints precluded him from actively preparing the Petitioner's defense.

For the foregoing reasons, this Honorable Court should grant this petition for a writ of certiorari.

II. THE CIRCUIT COURTS ARE CLEARLY DIVIDED AS TO THE STANDARD WHICH MUST BE APPLIED IN ASSESSING THE EFFECTIVENESS OF COUNSEL.

There is no uniform standard by which a court may gauge the effectiveness of counsel. What passes muster in one Circuit will not pass muster in another Circuit.

For instance, the Third Circuit (Moore (supra) employs the community standards approach in appraising the effectiveness of counsel while the Tenth Circuit applies the "mockery of justice" test. (United States v. Dingle, 1378 (10th Cir. 1976) 546 F.2d.

Notwithstanding the fact that the effectiveness of an attorney's representation rests substantially on the facts of each case, the lack of a single standard further contributes to the subjectivity already existing.

Since other rights such as the right to confrontation and cross-examination hinge upon the right to the effective assistance of counsel, effectiveness should not be subject to such wide interpretation. In order to resolve the conflicts in standards among the

Circuit Courts of Appeals, it is imperative that this Court will render a decision which will foster a more uniform approach.

II. THE RESOLUTION OF THE ISSUES INVOLVED IN THIS CASE WILL HAVE PUBLIC INTEREST.

The concern over the incompetency of the trial bar was one which Chief Justice Warren Burger of this Court has raised, 42 Fordham L. Rev. 227 (1973) 27 Fed. B.J. 228 (1967)

In fact, many state bar associations have proposed continuing legal education programs which would help to promote more effective legal representation. Also, amendments have been proposed which would require an attorney who desires to practice before the Federal Bar to have tried at least one case in Federal Court.

There is a need to check a decline in the quality of legal representation, especially in the area of criminal defense. Because a Defendant's freedom may possibly rest on the adequacy of an attorney's preparation, the courts should not engage in semantics as to whether counsel's representation was incompetent or "grossly incompetent". For the foregoing reasons, this Honorable Court should grant this Petition for a Writ of Certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted:

SANFORD H. COHEN, ESQ.

Counsel for Petitioner
1201 Chestnut Street, Suite 300
Philadelphia, PA 19107
(215) 563-3377

ROSEMARIE T. KENKELEN, ESQ.
Of Counsel
1201 Chestnut Street, Suite 300
Philadelphia, PA 19107
(215) 563-3377

(APPENDIX A)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1841

UNITED STATES OF AMERICA,

Appellee,

vs.

CLAYTON M. FOX,

Appellant.

Appeal from the United States District Court for the Middle District of Pa.
D.C. Criminal Action No. 79-8

Submitted Third Circuit Rule 12(6)
November 14, 1979

Before: Hunter, Weis and Garth,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by Appellant, to wit:

1) Whether the Appellant, Clayton M. Fox was denied the right to the effective assistance of counsel, H. Richard Agler, inadequately prepared his client's case;

2) Whether the trial court erred in failing to question sufficiently the qualifications of the court-appointed counsel, H. Richard Agler, when the Appellant raised the issue of counsel's ineffectiveness at the pretrial conference;

3) Whether the delay in filing the indictment by the United States against Appellant, Clayton M. Fox, for wilful failure to file income tax returns in violation of 26 U.S.C. §7203 deprived the Appellant of his Fifth Amendment right to due process of law;

4) Whether an alleged violation of Rule 53 of the Federal Rules of Criminal Procedure which pro-

hibits the presence of cameras in the courtroom deprived Appellant of the right to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution;

5) Whether the trial court committed an abuse of discretion in denying Appellant's motion for a continuance at the pretrial conference which deprived Appellant of his Sixth Amendment right to the effective assistance of counsel.

It is ADJUDGED AND ORDERED that the judgment of the District Court be and is hereby affirmed.

BY THE COURT:

/s/ Judge Hunter
Circuit Judge

Attest:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated: December 3, 1979